

TENNESSEE ETHICS COMMISSION

Minutes of October 31, 2006

Pursuant to the call of Chairman Thomas Garland, the Tennessee Ethics Commission ("Commission") met on Tuesday, October 31, 2006, at 9:00 a.m. in the auditorium of the Tennessee State Library and Archives in Nashville, Tennessee.

The following members were present:

Thomas J. Garland, Chair

R. Larry Brown

Donald J. Hall

Linda W. Knight

Dianne F. Neal

Benjamin S. Purser, Jr.

Chairman Garland made opening comments and called the meeting to order.

A motion by Chairman Garland to approve the minutes of the September 25, 2006 meeting was unanimously approved.

Chairman Garland recognized Bruce Androphy, the Commission's Executive Director.

Mr. Androphy announced that the Commission will be moving to a new office in the SunTrust Bank Building. The projected moving date is December 1, 2006.

Mr. Androphy announced that as of October 30, 2006, the Commission had 393 registered lobbyists and over 400 registered employers. He also announced that, as of October 31, 2006, over \$250,000 in registration fees had been collected by the Commission.

Mr. Androphy stated that he and his staff have been meeting with legislative leaders. He anticipates having mandated ethics training for members of the General Assembly in January 2007, when the Houses come back in session. He announced that his staff is working with both the Speakers' representatives to schedule that training. He also stated that he and Anne Turner conducted the first agency training last week for management of the Tennessee Department of Economic and Community Development and that this will be a template for future training for senior management of other state agencies.

Mr. Androphy requested that the Commission approve the hiring of Linda Creasman and Mona Jean-Baptiste. Linda Creasman has joined the staff as an administrative assistant. Her main job is currently to reconcile the lobbyist and employer registration fees, which was described as a difficult task considering the newness of the process. Mona Jean-Baptiste joined the staff yesterday as an attorney. She recently graduated from Vanderbilt University Law School and is a new member of the Tennessee Bar. She will be working

with Anne Turner and Bruce Androphy in carrying out legal functions and will take an active role in the ethics training.

A motion by Commissioner Neal to ratify the hiring of Linda Creasman and Mona Jean-Baptiste was unanimously approved.

Mr. Androphy then updated the Commission on the Commission Website. He stated that there are currently new forms, news, and postings of the event invitations that lobbyists or employers of lobbyists have sent to all the members of the Legislature. Mr. Androphy stated that he is also seeking authorization from the Commission for the lobbyists' answers to Question #6 and Question #9 on the Lobbyist Registration Statement to be posted as a chart on the website. Question #6 pertains to whether the lobbyist is related to an official of the executive or legislative branch, either as a spouse or other immediate family member. Question #9 refers to whether a lobbyist is in certain business arrangements with an official of the legislative or executive branch. He believes the answers to these questions will further assist with the transparency of government mandated by the Reform Act.

Commissioner Hall questioned Bruce Androphy regarding the posting of the answers to Question #6 and Question #9 from the Lobbyist Registration Form and whether there is other information that would be beneficial for the public. Mr. Androphy responded that the other questions on the Lobbyist Registration Form were of a factual nature such as addresses, e-mails, and names of the clients. Mr. Androphy feels that Question #6 and Question #9 should be tabulated for easier viewing because the answers to the questions are so specific.

A motion by Commissioner Knight to approve the tabulated posting of the answers to question Question #6 and Question #9 which are formulated from the Lobbyist Registration Forms, was unanimously approved.

Chairman Garland asked Mr. Androphy if he wanted to discuss the hiring of a senior attorney for the Commission. Mr. Androphy stated that he would like to defer this topic.

Commissioner Knight requested that Mr. Androphy provide the Commission with some form of organizational chart to include functions of the Commission staff, information regarding the status of the budget and how specific budget items are to be allocated. Information was also requested regarding pay for each employee, how appropriate salaries will be determined, and how the Commission will advertise for open positions in the future.

Chairman Garland agreed with Commissioner Knight and stated that he had discussions with Mr. Androphy regarding these issues. He also requested a flow chart of the Commission staff along with some form of job description for each position.

Mr. Androphy stated that he feels that he has successfully matched the staff with the current needs. He reported that the Commission has budgeted \$400,000 for salary. At this point, the staff is comprised of seven employees and there is about \$70,000 remaining in the budget for salaries. He reported that he will have more information available regarding the budget at the next Commission meeting. Mr. Androphy stated that, currently, there are two administrative assistants, Becky Bradley and Linda Creasman, one receptionist, Judy Bennett, one senior attorney, Anne Turner, another attorney, Mona Jean-Baptiste, and one legal assistant, Mindy Arrington. Mr. Androphy stated that all employees report directly to him.

Commissioner Purser suggested to Mr. Androphy that detailed job descriptions are not currently needed; however, the Commission does need more information regarding what job functions the staff is currently performing.

Chairman Garland had additional questions for Mr. Androphy regarding the SunTrust office layout. Mr. Androphy reported that there will be an office available for the Commissioners to use whenever needed. In addition, there is a room that is designated for office wiring.

Commissioner Knight also asked questions regarding the Suntrust office layout. Mr. Androphy reported that there will not be a conference room but there is plenty of space for meetings. Also, Mr. Androphy stated that office furniture is being ordered.

Commissioner Purser asked Mr. Androphy about computers for the new office. Mr. Androphy stated some equipment was ordered earlier and some is currently being ordered. He also stated that the Department of State handles computer needs.

Commissioner Knight asked Mr. Androphy what types of renovations have begun at the SunTrust site. Mr. Androphy reported that one room divider will be removed and all the walls will be painted.

Chairman Garland opened the discussion regarding the two advisory opinions.

Mr. Androphy described the first advisory opinion as an opinion to define when a lobbyist is required to register. He stated that the Commission has looked at the statute and talked with people in the legislature who were involved with the Reform Act regarding this issue. Mr. Androphy asked whether the Commission agreed with the conclusions of the first opinion. He suggested adopting the advisory conclusions and then making any stylistic changes later. He stated that he wants to circulate the first opinion later this week or the second week of November.

Commission Brown asked Mr. Androphy for clarification regarding lobbyists who are full-time employees of the employers for whom they lobby. Mr. Androphy does not see a need to distinguish this type of lobbyist in the definition of when a lobbyist is required to register.

Commissioner Hall questioned Mr. Androphy regarding how to proceed. Mr. Androphy stated that he would like to get the conclusions approved, although it may take a couple of weeks to get the opinion finalized. He emphasized that he wants the opinion to be a reflection of everyone's thoughts.

Commissioner Knight moved to adopt the conclusion of the first opinion subject to final approval. Commissioner Neal seconded the motion.

Commissioner Purser and Commissioner Neal had questions as to the extent of "stylistic changes." Commissioner Purser stated that he would prefer to adopt the advisory opinion in whole when it is completed.

Chairman Garland further discussed the options available to the Commission regarding the first advisory opinion.

Commissioner Brown stated that he agrees with the concepts of the opinion but he wants more specific language regarding lobbyists who are employed as full-time employees for corporations or entities.

Commissioner Hall echoed Commissioner Brown's concerns. He stated that he also has concerns that require more emphasis in the advisory opinion.

Commissioner Neal moved to postpone the adoption of the first advisory opinion until some of the changes have been made. Commissioner Knight retracted her original motion.

Chairman Garland suggested to Mr. Androphy to have a final version of the first advisory opinion available at the next Commission meeting.

Mr. Androphy began a discussion of the second advisory opinion regarding when attorneys must register as lobbyists. He believes the draft opinion is a starting point for discussions. He also suggested that a bright line approach is the goal for this opinion because there is some overlap when an attorney is acting as a lobbyist and when an attorney is acting solely as an attorney.

Mr. Androphy stated that he is aware that Commissioner Knight believes that the exemption from lobbying for administrative acts is meant to exclude more than ordinary, routine acts. Commissioner Knight provided the example of a certificate of need as a type of administrative act that should be exempt from the statute. Other examples suggested by Commissioner Knight are tax investigations and environmental permits. These types of interactions were described as simply the "business of government."

Courtney Pearre added that public policy is to settle disputes without filing lawsuits. He believes the first draft of this opinion would lead to more lawsuits. He also stated that the

Supreme Court of Tennessee regulates the practice of law and, therefore, he foresees separation of powers issues with the current version of the advisory opinion.

Chairman Garland asked for clarification regarding certificates of need. Commissioner Knight and Courtney Pearre discussed the current process for seeking approval of certificates of need.

Mr. Androphy asked if lobbying could occur during the certificate of need process. Commissioner Knight stated that she does not believe it is lobbying if a discussion occurs before the application for a certificate of need is made.

Assistant Attorney General Janet Kleinfelter recommended that the Commission only address the specific questions posed in the requests for advisory opinions.

Chairman Garland agreed with Ms. Kleinfelter.

Dick Lodge suggested that the definition of “administrative action” has to be explored to determine the answers for the advisory opinion. Mr. Lodge provided a history of the definition of “administrative action” and how it relates to attorneys and lobbying. He believes the interpretation of the current lobbyist statute begins with a broad interpretation of “administrative action.”

Ms. Kleinfelter pointed out that “administrative proceeding” is used in the new statute instead of the term “administrative action.” She believes that “administrative action” is defined much broader than “administrative proceeding.”

Chairman Garland suggested a ten minute break.

THE COMMISSION RECESSED FOR A SHORT BREAK.

THE COMMISSION RECONVENED AT 10:17 A.M.

Mr. Androphy directed the Commission to consider the particular questions posed in the advisory opinion request. He referred to page 5 of the draft. All members agreed with the conclusion of the first question that attorneys do not have to register as lobbyists in the scenario regarding informal taxpayer conferences because it is within the ambit of an administrative proceeding.

All members agreed with the conclusion of scenario #2, on page 5, regarding attorneys appearing before the Board of Equalization. The members agreed that attorneys also do not need to register as lobbyists under these facts.

All members agreed that attorneys also do not need to register as lobbyists in scenario #3, on page 5, regarding attorneys appearing before executive branch officials concerning economic incentive packages as the statute provides a separate exemption of this activity.

All members agreed that attorneys do not have to register in scenario #4, on page 5, which involves attorneys providing information, statistics, studies, etc. to legislative and executive branch officials on behalf of their clients when the request is made by the official.

Mr. Androphy moved the discussion to Mr. Trauger's questions in his request for an advisory opinion.

All members agreed with the answer to Mr. Trauger's first question and concluded that attorneys do not need to register as lobbyists when providing his or her client internal strategic and general legal advice.

Commissioner Brown had questions concerning when an attorney communicates with the Department of Revenue on behalf of a client. Mr. Androphy suggested to strike the sentence on page 5 that reads, "On the other hand, an attorney may not call or otherwise communicate with the Department of Revenue on behalf of a client and argue a client's case before there has been an actual assessment of a tax due without first registering as a lobbyist for, in this situation, there is not a contested case or administrative proceeding." Commissioner Hall also suggested striking the sentence on page 5 that reads, "The unsolicited provision of such information would constitute lobbying for which the attorney must register." All members agreed to strike these sentences from the opinion as they are not necessary to answer the question posed.

Mr. Androphy then referenced the bottom of page 5 of the opinion and asked for the Commissioners' opinions. All concurred that the attorney does not have to register as a lobbyist if the attorney calls the executive official to inquire as to the status of the certificate of need application and the application of the agency's rules and regulations. However, there was not a general consensus regarding the certificate of needs and the point of time when an attorney must register as a lobbyist. Mr. Androphy suggested changing the language of the next sentence. All members agreed to change this sentence to read, "In addition, once an application for a certificate of need has been filed, and public notice has been provided, and the attorney has made an appearance with the agency, the attorney may communicate with the agency without registering as a lobbyist."

Allan Ramseur had other comments regarding certificates of need. He stated that the Rules of Professional Responsibility for attorneys already define limitations for discussions with a tribunal.

Mr. Androphy referred the members to another section of the opinion at the bottom of page 5 and the top of page 6. Commissioner Knight stated that the economic development package is an exception to this section. Commissioner Neal suggested the language in one sentence in this section be changed to, "...the attorney may be required to register." Mr. Androphy stated that the sentence would now read, "The attorney may be required to register as a lobbyist when communicating with the agency to obtain the

client's participation in an agency grant or benefit, as this could fall within the definition of lobbying for which no exclusion applies." All Commissioners agreed with the new language of this sentence.

Mr. Androphy then referred the Commission to page 6 and the sentences that discuss an attorney meeting with an executive official outside of the hearing context to discuss a client's compliance or failure to comply with agency rules. Ms. Knight respectfully disagreed with the answer that this is lobbying by the attorney. She believes this type of action lies squarely within the administrative action exception. Commissioner Brown agreed with Commissioner Knight's position that this type of administrative action is not lobbying, but for different reasons. He does not agree that this type of action fits within the definition of lobbying. More discussion followed regarding this topic. Mr. Androphy stated that he is concerned when there is not a public record of the matter. Commissioner Brown stated that he believes the statute is designed to address issues of general application, not areas of specific application for specific companies. Commissioner Purser asked Mr. Androphy how the sentence should be changed to fit with the discussion. Mr. Androphy suggested a change to the language that will change the answer to this final question. He also suggested deleting the sentences beginning with, "Note that ..." until the end of the paragraph. All members agreed with these changes.

All members agreed with the conclusion of the final paragraph regarding attorney's compensation as lobbyists.

Mr. Androphy thanked the Commissioners for all their help and told the members that the changes would be circulated to them.

Mr. Androphy requested that the Commission seek authorization to be a provider of Continuing Legal Education credit for attorneys. The Commission unanimously agreed.

Mr. Androphy updated the Commission on the cross-referencing by the staff to determine which employers and lobbyists have failed to register and which have not paid fees. He requested to send out warning letters which will be sent by registered and first class mail. The Commission unanimously agreed.

Mr. Androphy stated the next Commission meeting will be December 12, 2006 at 12:00 p.m. and lunch will be provided. Commissioner Purser suggested an e-mail be sent to the Commissioners to remind them about the meeting.

Mark Greene who represents the Tennessee Lobbyist Association thanked the Commission staff for their work and has had compliments regarding the staff's friendliness and availability. Mr. Greene also wants the Commission to consider monitoring by lobbyists as opposed to contact with an official in the first advisory opinion.

Minutes of the Tennessee Ethics Commission

October 31, 2006

Page 8 of 8

Commissioner Purser thanked attendees for their questions and their participation in the process.

Mr. Androphy also thanked the Commission staff for their hard work.

There being no further business, Chairman Garland adjourned the commission meeting at 11:16 a.m.

Respectfully Submitted,

Melinda R. Arrington

November 6, 2006